

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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| UNITED STATES OF AMERICA, |) | Case No. 2:09-cr-00512-ECR-PAL |
| |) | Related Case No. 2:11-cv-00023-ECR |
| Plaintiff, |) | |
| vs. |) | ORDER DENYING DEFENDANT'S |
| |) | MOTION TO VACATE, SET ASIDE, |
| LUIS G. PARADA-HERRERA, |) | OR CORRECT SENTENCE UNDER 28 |
| Defendant. |) | U.S.C. § 2255 |

On January 5, 2011, Defendant filed a motion (#31) under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence by a person in federal custody. The Government has responded (#37) to the motion, and Defendant has filed a reply (#39) in support of the motion.

Defendant states two claims for relief:

- I. Defendant was denied effective assistance of counsel, and
- II. Defendant's specific offense characteristics enhancement of 16 levels significantly over represented the seriousness of his offense conduct.

CLAIM I

In support of Claim I, Defendant argues his counsel failed to request the records and files of the state court conviction which were used to establish the 16

1 level enhancement. He also argues that his counsel failed to object to the
2 Presentence Report (“PSR”) regarding the 16 level enhancement in the Guideline
3 calculation. Finally, Defendant claims that his counsel failed to argue or object
4 to the 16 level enhancement in the Guideline calculation on the basis that it over
5 represented the seriousness of the prior state conviction and that if counsel had
6 requested the state court record and files, those records would have demonstrated
7 that Defendant entered a plea to a lesser included offense.

8 During the plea-taking proceeding, Defendant, under oath, in response to a
9 direct question stated by the Court, specifically testified that he had previously
10 been convicted on January 14, 2004, of a crime of violence in the District Court
11 of Clark County, Nevada.

12 The Plea Memorandum, which set forth the plea agreement, provided
13 specifically for a 16 level enhancement because Defendant was previously
14 convicted of a felony crime of violence. During the plea taking, the Court asked
15 Defendant if he had discussed the memorandum with his attorney and whether
16 his attorney had answered any questions he had about it to which the Defendant
17 answered, “yes.” The Court then asked Defendant if he understood the plea
18 agreement and he stated under oath that he did. At the plea taking, the Court
19 explained how the Guidelines worked, including enhancements in the
20 calculations, and Defendant testified that the Court’s explanation came out the
21 same as what his attorney had told him.

22 Defendant does not state in the present motion or reply what the state court
23 records and files would have shown that would demonstrate that the 16 level
24 enhancement over represented the seriousness of the prior conviction. This claim
25 is alleged only in a conclusory fashion. Defendant does not cite to any facts in
26 those records and files to support his position. The fact that he pleaded to a
27 lesser included offense does not demonstrate that the prior crime was not a
28 violent offense requiring the 16 level increase.

1 At the sentencing hearing, the Assistant United States Attorney described
2 the circumstances of the event which was the basis for Defendant's prior
3 conviction. These circumstances were that Defendant and the victim were
4 involved in an altercation and that Defendant ran up to the victim's car, broke the
5 victim's front passenger window with his chrome semiautomatic hand gun, and
6 shot the victim in the groin. According to the Assistant United States Attorney at
7 the hearing, Defendant was originally charged with attempted murder with a
8 deadly weapon, but later pleaded guilty to battery with a deadly weapon. In his
9 present moving papers, Defendant does not endeavor to challenge this recital of
10 the facts of his prior conviction or the circumstances of it. Certainly, only one
11 reasonable conclusion can be reached – the prior conviction was for a crime of
12 violence. The 16 level enhancement was properly applied.

13 The fact that Defendant's prior conviction was based on an Alford plea
14 makes it no less a conviction for a violent crime. The Alford plea is a guilty plea
15 for the purposes of determining whether the conviction was for a violent crime.

16 At the sentencing hearing, Defendant stated he had no objection to the
17 Presentence Report ("PSR") which contained the level 16 enhancement. He
18 admitted that the PSR had been translated for him into the Spanish language, that
19 he discussed it with his attorney, that he understood it, and that he had no
20 objections to it. Defendant specifically stated in open court that he had no
21 objections to the Presentence Report as presented.

22 Defendant also claims in his motion that due to his attorney's ineffective
23 assistance of counsel, he lost the opportunity for a downward departure on the
24 basis that the 16 level enhancement over represented the seriousness of the prior
25 state conviction.

26 The facts presented do not indicate any basis on which Defendant's
27 counsel might have been able to argue for a downward departure had the records
28 and files of the state court conviction been made known at the time of sentencing.

1 The description by the Assistant United States Attorney of what happened at the
2 time of the commission of the crime is strong support for the conclusion that the
3 16 level increase does not over represent the seriousness of the crime.

4 Defendant claims that he always understood from counsel that he would
5 not be subject to more than 18 months imprisonment. The plea agreement
6 contains no such assurances. At the plea taking, Defendant was asked whether
7 any promises or representations had been made to him to induce him to plead
8 guilty except for the benefit of the plea agreement. Defendant answered, "no."
9 He was asked whether anyone had promised him a particular sentence and again
10 he answered, "no."

11 At the plea taking, the Court advised Defendant that no one was in a
12 position to promise him any particular sentence because it was an unknown at
13 that time; that the Court was the only one that could determine his sentence; and
14 that the sentence had not been determined. The Court also stated to Defendant
15 at the plea taking that the Court had jurisdiction and authority to impose any
16 sentence within the statutory maximum for the crime.

17 Defendant's present claim that he understood his sentence would be no
18 more than 18 months must fail in light of the Court's admonition to him at the
19 plea taking. He could not claim to rely on the alleged understanding from
20 counsel in pleading guilty.

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CONCLUSION

THEREFORE, it is Ordered that

Defendant's Motion (#31) filed on January 5, 2011, under 28 U.S.C. §
2255 is DENIED.

The Clerk shall enter judgment accordingly.

DATED this 14th day of April 2011.



EDWARD C. REED, JR.
United States District Judge

United States of America v. Parada-Herrera
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